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6 and USF&G, Defendants

7 IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA AT ANCHORAGE

8 UNITED STATES OF AMERICA for the )  
use of NORTH STAR TERMINAL & )  
9 STEVEDORE COMPANY, d/b/a NORTHERN )  
STEVEDORING & HANDLING, and NORTH )  
10 STAR TERMINAL & STEVEDORE COMPANY, )  
d/b/a Northern Stevedoring & )  
11 Handling, on its own behalf, )

No. A98-009 CIV (HRH)

12 Plaintiffs, )

13 and )

14 UNITED STATES OF AMERICA for the )  
use of SHORESIDE PETROLEUM, INC., )  
d/b/a Marathon Fuel Service, and )  
15 SHORESIDE PETROLEUM, INC., d/b/a )  
Marathon Fuel Service, on its own )  
16 behalf, )

17 Intervening Plaintiffs, )

18 and )

19 METCO, INC., )

20 Intervening Plaintiff, )

21 vs. )

22 NUGGET CONSTRUCTION, INC.; SPENCER )  
ROCK PRODUCTS, INC.; UNITED )  
23 STATES FIDELITY AND GUARANTY )  
COMPANY; and ROBERT A. LAPORE, )

24 Defendants. )  
25

MEMORANDUM IN OPPOSITION OF  
METCO'S AND SHORESIDE'S  
MOTION AND MEMORANDUM FOR  
SUMMARY JUDGMENT AGAINST  
AND DETERMINATION OF LAW  
REGARDING NUGGET  
CONSTRUCTION

Introduction

In their Motion for Summary Judgment ("Motion") against Nugget, Metco and Shoreside ask the court to ignore the Ninth Circuit's prior decisions in this case establishing that (1) Spencer Rock Products was a supplier and not a subcontractor, (2) there was no express contract between either Metco or Shoreside and Nugget, (3) there is an issue of fact with regard to whether Nugget converted Spencer into a "strawman" such that a federal implied-in-fact contract was established. These prior decisions render meaningless the first two "legal basis" for dispositive relief sought in the Motion. As to the third "legal basis" presented in the Motion, the baseless nature of Metco's and Shoreside's state law claims is thoroughly discussed in Nugget's Motions for Summary Judgment on those issues.

Rather than establish that there are no genuine issues of material fact on a specific claim or point of law in this case, Metco and Shoreside instead seek summary judgment on ostensibly equitable grounds; arguing that they are "little guys" and that Defendants are being "macho" in refusing to settle. The term "fraud" is tossed around like a Frisbee without any attempt to establish a single element of such a claim. Never mind the fact that there is no cause of action involving fraud even alleged in this case. Metco and Shoreside go so far as to insinuate that Nugget's attorneys are part of some grand civil conspiracy because they drafted a letter on behalf of their client and represented its interest to the best of their

1 ability. Under Metco's and Shoreside's view of the world, every  
2 lawyer who successfully advocates on behalf of his or her client is  
3 guilty of conspiring with the client to defraud someone. This  
4 assertion is as preposterous as it is offensive to every member of the  
5 bar.<sup>1</sup>

6 Finally, Metco and Shoreside take offense to the fact that Nugget  
7 did not pay them the sums demanded when it would have cost Nugget less  
8 to have simply paid the amounts demanded at the outset. Basically,  
9 these plaintiffs are upset that Nugget refused to give into their  
10 "litigation extortion" and pay them when they are not entitled. At  
11 the beginning of this lawsuit there was a legitimate debate over  
12 whether Spencer Rock was a supplier or a subcontractor. That question  
13 was resolved by the Ninth Circuit, which decided it in Nugget's favor.  
14 At that point, this matter should have ended. Instead, the plaintiffs  
15 have spent years and unconscionable amounts of money chasing windmills  
16 and concocting bogeyman conspiracy theories. Metco and Shoreside  
17 object to the amount of money Nugget has spend defending itself  
18 against unfounded claims, but the real question here is how do Metco  
19 and Shoreside justify spending eight years chasing \$30,000 and \$50,000  
20 respectfully. All three plaintiffs erroneously believe that they were

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21  
22 <sup>1</sup> The Motion essentially threatens Nugget with the disqualification of its  
23 lawyers at trial, casting its threat as a requirement that might come from  
24 the bench. If Metco and/or Shoreside truly believe there is a basis for  
25 disqualifying Oles Morrison, they should be required to bring such a motion  
now and not at trial when Nugget would surely be prejudiced by a  
disqualification.

1 covered by the Miller Act, and have continued to drag Nugget through  
2 this interminable process despite the Ninth Circuit telling them years  
3 ago that they were wrong.

4 The present Motion is simply an example of Metco and Shoreside  
5 attempting to take yet another bite at the apple. Unfortunately for  
6 Nugget, it again has to respond to an ill-prepared, unsupported Motion  
7 that arguably fails to satisfy the requirements of Rule 11, given its  
8 unabashed attempt to re-argue issues already decided by the Ninth  
9 Circuit. For these, and the reasons set forth below, Metco's and  
10 Shoreside's Motion should be denied.

#### 11 Factual Background

12 In support of its Opposition to Metco's and Shoreside's Motion,  
13 Nugget incorporates herein the factual recitations and accompanying  
14 affidavits in Nugget's Summary Judgment Motions against each parties'  
15 state law claims. See Docket Nos. 477,478,479,481,482 and 483.

#### 16 Argument

##### 17 A. Summary Judgment Standard

18 As a threshold matter, Metco and Shoreside have utterly failed to  
19 meet their burden of either production or persuasion as required  
20 before the court can consider granting a motion for summary judgment.  
21 Rule 56(c) of the Federal Rules of Civil Procedure instructs that a  
22 motion for summary judgment shall be "rendered forthwith if the  
23 pleadings, depositions, answers to interrogatories, and admissions on  
24

25 *U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*  
Case No. A98-009 CIV (HRH)  
Memorandum in Support of Nugget Construction, Inc.'s Motion for Summary  
Judgment Against Shoreside-- Page 3 of 14

1 file, together with the affidavits, if any, show that there is no  
2 genuine issue as to any material fact and that the moving party is  
3 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).  
4 Federal summary judgment procedure requires the piercing through the  
5 pleadings and their adroit craftsmanship to reach the substance of the  
6 claim. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,  
7 475 U.S. 574, 587 (1986).

8 In the present Motion, Metco and Shoreside have included an  
9 irrelevant affidavit from a third-party, deposition testimony from its  
10 own witnesses, and incorporated the full breadth of its prior  
11 interrogatory responses from their summary judgment motion against  
12 USF&G ("USF&G Motion") as the factual basis in support thereof. This  
13 regurgitation of the allegations set forth in their respective  
14 Complaints is insufficient to establish their entitlement to summary  
15 disposition of these matters.

16 Of course, a party seeking summary judgment always bears  
17 the initial responsibility of informing the district court  
18 of the basis for its motion, and identifying those portions  
19 of "the pleadings, depositions, answers to interrogatories,  
20 and admissions on file, together with the affidavits, if  
21 any," which it believes demonstrate the absence of a  
22 genuine issue of material fact.

23 *Celotex v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed. 265  
24 (1986). Nowhere in the Motion do Metco and Shoreside attempt to state  
25 for the court what issues are uncontroverted, or more importantly,  
which facts are even applicable to the legal issues they raise. Other

*U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*  
Case No. A98-009 CIV (HRH)  
Memorandum in Support of Nugget Construction, Inc.'s Motion for Summary  
Judgment Against Shoreside-- Page 4 of 14

1 than the inapposite affidavit of John Dennis Stacey<sup>2</sup> and the short  
2 deposition excerpts of their own witnesses, Metco and Shoreside have  
3 supplied not one citation for its numerous "factual" assertions. They  
4 essentially ask the court and Nugget to wade through the pages and  
5 pages of interrogatory responses in an effort to ascertain what is  
6 relevant to the present Motion. Without properly cited and admissible  
7 evidence accompanying the Motion, it becomes nothing more than  
8 counsel's argument, which fails to satisfy the burdens set forth in  
9 *Celotex* for the movant to establish the absence of a genuine issue of  
10 material fact. *Id.* Metco's and Shoreside's failure in this  
11 fundamental element of any summary judgment motion is sufficient  
12 grounds to deny the Motion.

13 B. The Interrogatory Responses Provided In Metco's And Shoreside's  
14 Motion Against USF&G, And Incorporated In The Present Motion, Do  
15 Not Contain Admissible Evidence, And Therefore, Should Be  
16 Stricken.

17 Although interrogatory responses are appropriate for use in  
18 either establishing or defeating issues of fact in a summary judgment  
19 motion, those responses must first meet the requirements for  
20 admissibility of an affidavit (*See MOORE'S FEDERAL PRACTICE* 3D, §  
21 56.14[2][b]); i.e., the interrogatory responses must be made on

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22 <sup>2</sup> Metco and Shoreside include Mr. Stacey's affidavit in the Motion without  
23 ever establishing its relevance to the claims at issue in this matter, or to  
24 the arguments presented therein. In addition to being irrelevant, Mr.  
25 Stacey's affidavit contains numerous statements for which he does not appear  
to have personal knowledge or are simply his opinion, as he only "believes"  
or "presumes" certain events described therein. For these reasons, Mr.  
Stacey's affidavit should be stricken. *Columbia Pictures Industries, Inc. v.*  
*Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1529 (9<sup>th</sup> Cir. 1991).

*U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*

Case No. A98-009 CIV (HRH)

Memorandum in Support of Nugget Construction, Inc.'s Motion for Summary  
Judgment Against Shoreside-- Page 5 of 14

1 personal knowledge and not contain inadmissible hearsay. *Columbia*  
2 *Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*,  
3 944 F.2d 1525, 1529 (9<sup>th</sup> Cir. 1991). Because the interrogatory  
4 responses provided by Metco and Shoreside in support of the Motion are  
5 replete with unsupported factual allegations and substantial amounts  
6 of inadmissible hearsay, those responses should be stricken.

7 Unfortunately, the Motion's failure to identify the specific  
8 factual assertions it relies upon makes it nearly impossible for  
9 Nugget to identify which statements in the interrogatory responses  
10 require being stricken. Because of Metco's and Shoreside's initial  
11 failure, Nugget should not bear the burden of identifying every  
12 offending statement. Nevertheless, Nugget does provide the following  
13 example of objectionable statements in the Motion:

- 14 • "In response to a letter from Metco seeking payment, the  
15 Corps states in pertinent part in a letter to Nugget dated  
16 August 16, 1997 ..." USF&G Motion, p. 4. The letter from the  
17 Corps to Nugget is hearsay and Metco's personal knowledge  
18 regarding the letter is not established. The letters from  
19 the Corps included in the Interrogatory Response contain  
20 opinions of the Corps and do not represent facts supporting  
21 the present Motion.
- 22 • "Nugget was preoccupied with the status of Spencer Rock.  
23 However, the Corps of Engineers notes that Nugget was  
24 obligated 'not to request for progress payments that which  
25 you intend to withhold from a subcontractor or supplier.'  
Nugget may have been successful in the first appeal to the  
Ninth Circuit in characterizing Spencer Rock Products as a  
supplier rather than a subcontractor. However, that does not  
relieve Nugget of paying all the suppliers and subcontractors  
pursuant to this contract as construed by the agency charged  
with administrating the contract." USF&G Motion, p. 6. The  
statement contains no factual information based on either  
Metco's or Shoreside's personal knowledge. At best, the  
statements are speculative opinions, and are not admissible.

*U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*

Case No. A98-009 CIV (HRH)

Memorandum in Support of Nugget Construction, Inc.'s Motion for Summary  
Judgment Against Shoreside-- Page 6 of 14

- 1 • "Nugget was a large construction company that dictated the  
2 activities of Spencer Rock/Robert LaPore almost from the  
3 outset of the relationship." USF&G Motion, p. 6. Neither  
4 Metco no Shoreside were privy to the relationship between  
5 Nugget and Spencer Rock, and therefore, could not have  
6 personal knowledge of such. This is merely an allegation  
7 without supporting facts.
- 8 • "Nugget created a secret Support Agreement that effectively  
9 gave Nugget complete control of Spencer Rock/Robert LaPore  
10 and the Homer Project." USF&G Motion, p. 6. See previous  
11 objection.
- 12 • "Nugget required that the terms of the support agreement not  
13 be disclosed to the U.S. Corps of Engineers or to the  
14 claimants." USF&G Motion, p. 6. See previous objection.
- 15 • "Nugget knew or should have known that the three claimants  
16 were providing goods and performing services in reliance on  
17 the Miller Act bond and the incentive it provides for  
18 payment." USF&G Motion, p. 7. This statement is pure  
19 conjecture; particularly, as the only statements by Nugget or  
20 its representative, Randy Randolph, were to the opposite  
21 affect—that the claimants were not covered under the bond.
- 22 • "Nugget owed a duty of care not to act negligently and  
23 carelessly in its dealing with and treatment of the three  
24 claimants." USF&G Motion, p. 7. This is simply an  
25 allegation without any facts supporting the assertion of a  
duty.
- "... Nugget and Spencer then entered into an oral support  
agreement in late March, 1997." USF&G Motion, p. 10.  
Neither Metco no Shoreside were privy to the relationship  
between Nugget and Spencer Rock, and therefore, could not  
have personal knowledge of such. This is merely an  
allegation without supporting facts.
- "Nugget imposed an adhesion contract on Spencer and afforded  
itself the absolute right to run the Spencer Quarry and bring  
an action against Spencer for the type of claims asserted by  
the three claimants in this case. In addition, the three  
claimants are third-party beneficiaries of this Support  
Agreement." USF&G Motion, p. 10. Neither Metco no Shoreside  
were privy to the relationship between Nugget and Spencer  
Rock, and therefore, could not have personal knowledge of  
such. This is merely an allegation without supporting facts.

*U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*

Case No. A98-009 CIV (HRH)

Memorandum in Support of Nugget Construction, Inc.'s Motion for Summary  
Judgment Against Shoreside-- Page 7 of 14



- "USF&G knew or should have known of the problems Nugget was creating with respect to the claimants in this case by the summer of 1997. However, Nugget may have withheld and/or deliberately concealed some of this information and its secretive arrangements with Spencer from USF&G much like it did the claimants and the Corps of Engineers." USF&G Motion, p. 13. This statement is purely speculative and without any personal knowledge on the part of Metco and Shoreside.
- "Nugget appears to have structured all of its activities from the outset with the goal of using Spencer Rock as a shield to avoid paying North Star, Shoreside, and Metco." USF&G Motion, P. 16. This statement is merely an allegation without any factual support.

Suffice it to say that this is but a meager sampling of the inadmissible assertions from the interrogatory responses upon which Metco and Shoreside attempt to construct their basis for summary judgment. In addition to these incorporated by reference, Metco's and Shoreside's Motion contains further unsupported assertions, including the following:

- "At the same time that Nugget was taking the Spencer Quarry from Spencer Rock, Nugget was using Spencer Rock as a strawman and a shield to attempt to avoid payment of obligations related to the completion of the Homer Project."
- "The 'Support Agreement' is the merger and acquisition agreement."
- "Spencer Rock was little more than a captive entity or a wholly controlled subsidiary of Nugget from the outset of the work undertaken by the three claimants on the Homer Project in late March, 1997."
- "Nugget did not have a meeting of the minds because it sought to withhold material information and defraud the claimants by its actions, statements, letters and contracts."

Because Metco and Shoreside have failed to identify any kernels of admissible information that might be found among the bushels of

1 unsupported, speculative chaff in its interrogatory responses and  
2 "factual" assertions in its Motion, the entirety of those responses  
3 should be stricken.

4 C. Neither Metco Nor Shoreside Were Ever In Contractual Privity  
5 with Nugget For The Goods And Services At Issue In This  
6 Litigation, And Therefore, Have No Rights Under The Miller Act

7 In their Motion, Metco and Shoreside for the first time allege  
8 that they were in direct contractual privity with Nugget. That this  
9 court and the Ninth Circuit have both previously concluded that there  
10 was no express contract between the claimants and Nuggets appears to  
11 bother them not an iota. See District Court's August 30, 2002 Order  
12 ("It is undisputed that at the time Spencer negotiated with each of  
13 these parties, Spencer acted completely on its own behalf. There are  
14 no facts in the record supporting the inference that Spencer acted as  
15 an agent of Nugget at the time Spencer hired North Star, Shoreside, or  
16 Nugget."); Ninth Circuit's March 2005 Order ("The appellees never  
17 entered into express contracts with Nugget, and we have already held  
18 that Spencer Rock acted not as a subcontractor but as a materialman on  
19 this project."). Nor do they appear to be bothered by their own  
20 previous deposition testimony contradicting this assertion: Metco: "Q:  
21 And during this period of time until you last provided services on the  
22 26th, you believed you had a contract with Spencer? A. Yes. And you  
23 had no contract negotiations with Nugget? A. No, we didn't contract  
24 with Nugget." Krider Aff., Ex. 1, Dieckgraeff Dep., p. 32, ln. 5-11.  
25 Shoreside: "Q. So in other words, in your mind, your contract was

*U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*  
Case No. A98-009 CIV (HRH)  
Memorandum in Support of Nugget Construction, Inc.'s Motion for Summary  
Judgment Against Shoreside-- Page 9 of 14

1 with Spencer Rock, but you had a bond in place in case Spencer Rock  
2 failed to pay you. Is that a fair summary? A. I think that's a fair  
3 assessment." Krider Aff., Ex. 2, Lechner Dep., p. 24, ln. 8-11.

4 With respect to Metco, the Motion provides no new theory for  
5 establishing a direct contractual relationship between it and Nugget.  
6 Rather, Metco appears to hope to ride on Shoreside's coattails in this  
7 approach. As such, its position should be summarily dismissed.

8 Shoreside, on the other hand, at least makes an attempt to  
9 concoct an argument that there was privity with Nugget, although it  
10 does so with a certain tortured logic. Shoreside's argument goes like  
11 this: (1) Shoreside had a credit agreement with Spencer Rock, (2)  
12 Shoreside also had a credit agreement with Nugget, thus, (3) the  
13 delivery of goods to Spencer Rock create a contract between Shoreside  
14 and both Spencer and Nugget. It proffers this position despite its  
15 deposition testimony in which it admits the goods and services were  
16 ordered by Spencer Rock, invoiced to Spencer Rock, and that it only  
17 looked to Nugget for payment of those goods and services because there  
18 was a bond in place.

19 The fact that Shoreside contracted separately with Nugget for  
20 goods and services on other projects and for goods and services at a  
21 later time for the Homer project does not in any way create a  
22 contractual relationship between Shoreside and Nugget for the goods  
23 and services ordered by Spencer Rock that are the subject of this  
24 litigation.

25 *U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*  
Case No. A98-009 CIV (HRH)  
Memorandum in Support of Nugget Construction, Inc.'s Motion for Summary  
Judgment Against Shoreside-- Page 10 of 14

1 D. Metco's And Shoreside's Request For A Finding Of A Federal  
2 Implied In Fact Contract Is Without Basis

3 It is very strange indeed that Metco and Shoreside would think it  
4 reasonable to bring a motion for summary judgment on the issue of  
5 whether Spencer Rock Products was a "strawman" under a federal  
6 implied-in-fact contract theory; particularly given that this issue  
7 was already determined by the Ninth Circuit to contain issues of fact.  
8 There is no new evidence pointed to by Metco and Shoreside to indicate  
9 that the universe of facts is now resolved such that summary judgment  
10 is warranted. Nor is there any explanation as to why they are  
11 entitled to bring this motion a second time. If Metco and Shoreside  
12 wish to overturn the Ninth Circuit's decision on this issue, this  
13 certainly is not the appropriate place to do so.

14 Because of Metco's and Shoreside's flagrant disregard for the  
15 Ninth Circuit's prior holding on this very issue, Nugget should be  
16 entitled to terms for having to respond to this argument, as there can  
17 be no valid justification for this motion under Rule 11 (b).

18 E. Metco's And Shoreside's State Law Claims Are Without Merit And  
19 Should Be Dismissed

20 As fully set forth in Nugget's summary judgment motions against  
21 Metco and Shoreside on their state law claims, there is no legal or  
22 factual basis for any of those claims. Because, here again, Metco and  
23 Shoreside have failed to properly establish their factual basis for  
24 granting this motion, it is nearly impossible to fully respond herein.  
25 Therefore, rather than attempt to divine the basis for this request,

*U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*  
Case No. A98-009 CIV (HRH)  
Memorandum in Support of Nugget Construction, Inc.'s Motion for Summary  
Judgment Against Shoreside-- Page 11 of 14

1 Nugget will simply incorporate herein the entirety of its motions  
2 against Metco and Shoreside, which are more than sufficient to defeat  
3 this portion of their Motion.

4 F. North Star's Joinder Is Untimely And Fatally Flawed In The Same  
5 Manner As The Underlying Motion

6 On May 9, 2006, a full eight days after the dispositive motion  
7 cutoff, North Star filed a Joinder to Metco's and Shoreside's Motion.  
8 If the pleading has been a simple "North Star hereby joins in Metco's  
9 and Shoreside's Motion," Nugget would have no objection. However,  
10 because North Star seeks to provide substantive support for its  
11 entitlement to summary judgment, the Joinder is untimely and improper.

12 In addition to being untimely, North Star's Joinder suffers from  
13 the same defects as the underlying Motion with regard to complying  
14 with Rule 56. There is no indication which claims North Star's  
15 purported facts apply to and no analysis explaining how those facts  
16 entitle it to judgment as a matter of law.

17 Substantively, there is nothing in the North Star Joinder that  
18 alters the defects in the Motion described above. As such, North  
19 Star's Joinder should also be denied. However, to the extent  
20 necessary, Nugget also incorporates herein its motion for summary  
21 judgment against North Star and accompanying affidavits as opposition  
22 to this Motion. See Docket Nos. 489, 490 and 491.

23 Conclusion

24 Metco's and Shoreside's Motion is nothing more than a blatant  
25 attempt to force Nugget to expend additional resources defending

*U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*  
Case No. A98-009 CIV (HRH)  
Memorandum in Support of Nugget Construction, Inc.'s Motion for Summary  
Judgment Against Shoreside-- Page 12 of 14

1 against the on-going "litigation extortion" being perpetrated by  
2 plaintiffs in this matter. This can be the only reasonable conclusion  
3 given (1) the lack of any meaningful attempt to establish the absence  
4 of a genuine issue of material fact as required under Rule 56, and (2)  
5 the brazen disregard for the Ninth Circuit decisions previously  
6 rendered in this case, which held that there was no direct contract  
7 between Nugget and plaintiffs and that there was a genuine issue of  
8 fact regarding the existence of a federal implied-in-fact contract.  
9 Based on the foregoing, Metco's and Shoreside's Motion should be  
10 denied.

11 Dated: May 18, 2006

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14 Inc., and United States  
15 Fidelity and Guaranty Co.

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Case No. A98-009 CIV (HRH)

Memorandum in Support of Nugget Construction, Inc.'s Motion for Summary  
Judgment Against Shoreside-- Page 13 of 14

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Case No. A98-009 CIV (HRH)  
Memorandum in Support of Nugget Construction, Inc.'s Motion for Summary  
Judgment Against Shoreside-- Page 14 of 14